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82-1242

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

In re KEENE CORPORATION, GAF CORPORATION AND PACOR, INC.,

Petitioners.

PETITION FOR WRITS OF PROHIBITION AND MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether this Court should issue writs of prohibition and mandamus to the United States District Court for the Southern District of New York and the United States Bankruptcy Court for the Southern District of New York to prevent their unlawful exercise of bankruptcy jurisdiction, on the ground that the decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982) invalidated the entire jurisdictional grant of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2549, 2668 (1978) (the "Reform Act"), thereby depriving both the bankruptcy courts and the district courts of the United States of all jurisdiction, either original and exclusive or original but not exclusive, of all cases under, arising in or related to cases under title 11 of the

United States Code, 11 U.S.C. § 101 et seq?

2. Whether the district courts of the United States have the power to adopt an emergency rule delegating to the bankruptcy courts the authority declared to be unconstitutional in Marathon?

LIST OF PARTIES

Keene Corporation, petitioner, is a New York corporation with an office and principal place of business in the County, City and State of New York.* Keene Corporation is a plaintiff in the adversary proceeding in respect of which relief is requested. Keene Corporation

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* This is Keene Corporation's original designation of corporate relationships pursuant to Supreme Court Rule 28.1. Bairnco is the parent of Keene Corporation. BZ Acquisition Corp. is a wholly-owned subsidiary of Bairnco. Lightolier, Incorporated is a wholly-owned subsidiary of BZ Acquisition Corp. Lightolier, Incorporated is an affiliate of Keene Corporation.

also seeks relief from a temporary restraining order issued against it and Pacor, Inc., by the Honorable Burton R. Lifland, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York.

GAF Corporation, petitioner, is a Delaware corporation with an office and principal place of business in the County, City and State of New York.* GAF Corporation is a plaintiff in the adversary proceeding in respect of which relief is requested.

Pacor, Inc., petitioner, is a Pennsylvania corporation with an office and principal place of business in the County and City of Philadelphia, State of

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* This is GAF Corporation's original designation of corporate relationship pursuant to Supreme Court Rule 28.1. GAF Corporation has an interest in the joint venture GAF-Huls Chemie, Gmbh. GAF Corporation does not have an ownership interest in any subsidiary other than wholly-owned subsidiaries. GAF Corporation has no affiliates.

Pennsylvania.* Pacor, Inc. seeks relief from a temporary restraining order issued against it and Keene Corporation by The Honorable Burton R. Lifland, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York.

Petitioner lists as the judges as to whom the writs are sought and the parties to the proceedings in respect to which relief is desired as follows:

The Honorable Constance Baker Motley is listed herein in her capacity as Chief Judge, United States District Court for the Southern District of New York and by virtue of her order of December 21, 1982 certifying the adoption of Emergency Rule I by the Board of Judges of the Southern District of New York. By order dated January 14,

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* This is Pacor, Inc.'s original designation of corporate relationship purusant to Supreme Court Rule 28.1. Pacor, Inc. has no subsidiaries or affiliates.

1983, Judge Motley entered an order setting forth limited procedural modifications of Emergency Rule I. Copies of the certification order, Emergency Rule I and the modifications appear in the Appendix at A-1 to -12.

The Honorable Burton R. Lifland is listed herein in his capacity as United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York and by virtue of his issuance of a temporary restraining order against Keene Corporation and Pacor, Inc. on January 6, 1983, and his decision and order of January 10, 1983, denying the motion of Keene Corporation, GAF Corporation and other parties for summary judgment in the adversary proceeding brought by them in the reorganization cases of Johns-Manville Corporation, et al., seeking, inter alia, to lift the automatic stay of 11 U.S.C. § 362(a) to permit the continued

prosecution of thousands of asbestos-related personal injury and property damage suits against the debtors. A copy of the temporary restraining order of January 6, 1983 appears in the Appendix at A1-13. A copy of the decision and order of January 10, 1983 appears in the Appendix at A-20.

Johns Manville Corporation, Manville Corporation, Manville Building Materials Corporation, Manville Forest Products Corporation, Manville International Corporation, Manville Export Corporation, Manville Products Corporation, Johns-Manville Amiante Canada Inc., Johns-Manville Canada Inc., Johns-Manville International Corporation, Johns-Manville Sales Corporation, Manville International Canada Inc., Manville Canada, Inc., Manville Investment Corporation, Manville Properties Corporation, Allan-Deane Corporation, Ken-Caryl Ranch Corporation, Manville Idaho

Inc., Manville Service Corporation, Manville Canada Service Inc. and Sunbelt Contractors, Inc. (collectively, "Manville") are listed herein in their capacity as defendants in the adversary proceeding in respect of which relief is requested. Manville was also the moving party for the temporary restraining order issued by Judge Lifland on January 6, 1983. Manville has filed petitions for reorganization under 11 U.S.C. §§ 1101 et. seq., in the United States Bankruptcy Court for the Southern District of New York. (Reorganization Nos. 82 B 11656-11676(BRL)).

Armstrong World Industries, Inc., H.K. Porter Company, Inc., Pittsburgh Corning Corporation, Garlock, Inc., Eagle-Picher Industries, Inc., The Celotex Corporation, and Fibreboard Corporation are listed herein in their capacity as plaintiffs in the adversary pro-

ceeding in respect of which relief is requested.

The Committee of Asbestos-Related Litigants and/or Creditors is listed herein in its capacity as defendant-intervenor in the adversary proceeding in respect of which relief is requested.

The Official Committee of Unsecured Creditors, The Securities and Exchange Commission, The United States Trustee for the Southern District of New York, Owens-Illinois, Inc., Liberty Mutual Insurance Company, certain plaintiffs in asbestos-related personal injury and property damage suits pending in the State of Ohio, Public Service Electric & Gas Company and Pacific Gas & Electric Company are listed herein in their capacity as persons or entities who appeared in the adversary proceeding in respect of which relief is requested.

The United States of America, a sovereign corporation and body politic,

is listed herein because petitioner seeks a determination respecting the constitutionality of an Act of Congress. The provisions of 28 U.S.C. § 2403(a) may apply to this petition. No court has certified to the Attorney General of the United States that the constitutionality of an Act of Congress was drawn in question in the adversary proceeding in respect of which relief is requested.

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S. Rep. No. 95-989, 95th Cong., 2d Sess. reprinted in 1978 U.S. Code Cong. & Ad. News 5787. 21

JURISDICTION

Jurisdiction to issue the writs sought herein is contained in 28 U.S.C. § 1651(a) and Supreme Court Rules 26 and 27.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST., art. III, §§ 1-2.

Bankruptcy Reform Act of 1978 § 241(a)

Bankruptcy Reform Act of 1978 § 401(a)

Bankruptcy Reform Act of 1978 § 405

11 U.S.C. § 362(a).

28 U.S.C. § 1331.

28 U.S.C. § 1334.

The pertinent text of the constitutional and statutory provisions involved are set forth in the Appendix commencing at A-90.

STATEMENT OF THE CASE

This petition arises out of the reorganization cases of Manville which are pending in the United States Bankruptcy Court for the Southern District of New York before the Honorable Burton R. Lifland, United States Bankruptcy Judge (the "Bankruptcy Court").

On August 26, 1982, Manville filed petitions for reorganization in the Bankruptcy Court pursuant to 11 U.S.C. §§ 1101 et seq., and continues to operate its business and manage its property as a debtor-in-possession pursuant to 11 U.S.C. §§ 1107-1108.

Prior to August 26, 1982, Manville, petitioners and others were co-defendants in thousands of lawsuits pending in state and federal courts throughout the United States. These lawsuits arise

out of the extensive use of thermal insulation products containing asbestos in the construction industry and shipyards (the "Asbestos Cases").[1] The plaintiffs in the Asbestos Cases typically claim that they are suffering from deleterious conditions caused by the inhalation of asbestos fiber or that they have incurred property damage caused by the presence of asbestos.

Upon Manville's filing of its petitions for reorganization, an automatic stay arose pursuant to 11 U.S.C. § 362(a) which, inter alia, enjoined all entities, including petitioners, from commencing or continuing any proceeding

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1. Manville is the world's largest miner, processor, manufacturer and supplier of asbestos and asbestos-containing products, and, as such, was the principal defendant in the vast majority of the Asbestos Cases. A summary of the background of the Asbestos Cases and Manville's pervasive role in these lawsuits appears in the Appendix at A-100.

against Manville or its property based upon pre-petition claims (the "Automatic Stay"). On August 26, 1982, the Bankruptcy Court also entered an ex parte order (the "Restraining Order") pursuant to 11 U.S.C. §§ 105, 362(a), 366, and 28 U.S.C. § 1471(c) staying, restraining and enjoining all persons, including petitioners, from commencing or continuing any proceedings against Manville or from enforcing any judgments against its property.

The Automatic Stay and the Restraining Order enjoined petitioners from proceeding against Manville in the Asbestos Cases. In many instances, the courts in these cases severed Manville from any further participation while permitting the litigation to continue against the remaining defendants, including petitioners.

On October 7, 1982, petitioners Keene Corporation and GAF Corporation, and other plaintiffs, filed a complaint against Manville in the Bankruptcy Court, commencing an adversary proceeding under rules 401, 701 and 11-61 of the Rules of Bankruptcy Procedure and Interim Bankruptcy Rule 7001. The complaint sought an order, inter alia, lifting the Automatic Stay and Restraining Order to permit the continued prosecution of the Asbestos Cases with Manville as a party. Keene Corporation, GAF Corporation and other plaintiffs in the adversary proceeding thereafter moved in the Bankruptcy Court for summary judgment on their complaint.

While the motion for summary judgment in the Bankruptcy Court was sub judice, The Honorable Constance Baker Motley, Chief Judge, United States Dis-

trict Court for the Southern District of New York (the "District Court"), entered an order on December 21, 1982, certifying the adoption of Emergency Rule I for the Southern District of New York on December 15, 1982, at a duly constituted meeting of the Board of Judges ("Emergency Rule I"). Emergency Rule I expressly states that its purpose:

> . . . is to supplement existing law and rules in respect to the authority of the bankruptcy judges of this district to act in bankruptcy cases and proceedings until Congress enacts remedial legislation in response to the Supreme Court's decision Northern Pipeline Construction Co. v. Marathon Pipe Line Co., ___ U.S. ___, 102 S. Ct. 2858 (1982), or until March 31, 1984, whichever first occurs.

Emergency Rule I (a). Appendix at A-2.

Emergency Rule I assumes that despite this Court's decision in Marathon, 28 U.S.C. §§ 1471 (a) and (b) remain valid and that this Court's decision in

Marathon invalidated only so much of 28 U.S.C. § 1471(c) as conferred jurisdiction on bankruptcy courts to determine state-law created rights related to bankruptcy proceedings.

On the authority of Marathon, petitioners Keene Corporation and Pacor, Inc. moved before the trial court in one of the Asbestos Cases in which the claims against Manville had previously been severed to restore Manville as a party.[2]

On January 6, 1983, the Bankruptcy Court issued a temporary restraining order enjoining petitioners Keene Corporation and Pacor, Inc. from taking any action in support of their motion to vacate the severance of the claims against Manville in the Philadelphia

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2. Morocco v. Johns-Manville Corp., No. 88 (123) 53. (Pa. C.P. Phila. Co.) (the "Philadelphia Asbestos Case").

Asbestos Case or any other Asbestos Case, and from taking any action in alleged violation of the Automatic Stay and Restraining Order. Appendix at A-13.

On January 14, 1983, an order was entered by the Bankruptcy Court, upon consent, which extended indefinitely the restraint imposed by the Bankruptcy Court on January 6, 1983. The Bankruptcy Court also directed Keene Corporation and Pacor, Inc. to withdraw their motion in the Philadelphia Asbestos Case and any other motions made to vacate the severance of Manville in the Asbestos Cases. A copy of the order of January 14, 1983 appears in the Appendix at A-84.

In a decision and order dated January 10, 1983, the Bankruptcy Court denied the motion for summary judgment,

holding inter alia, that no cause existed for lifting the Automatic Stay.

In his order of January 6, 1983, and in footnote 1 to his decision of January 10, 1983, Bankruptcy Judge Lifland stated that Emergency Rule I(d)(3)(A) set forth his authority to rule on both matters. Thus, the District Court, in Emergency Rule I, has arrogated unto itself the power to delegate to the Bankruptcy Court jurisdiction to apply and enforce the Automatic Stay. The Bankruptcy Court, adhering to the dictates of Emergency Rule I, continues to exercise jurisdiction in respect of the Automatic Stay. As a result, over 12,000 Asbestos Cases nationwide proceed against petitioners and others similarly situated, while the Automatic Stay and Restraining Order insu-

late Manville from any involvement therein.

For the reasons set forth below, petitioners submit that this Court's decision in Marathon invalidated the entirety of the Reform Act's jurisdictional grant to the district courts and the bankruptcy courts of the United States. Petitioners further submit that no independent basis exists for the continued exercise of bankruptcy jurisdiction by those courts. As a result, Emergency Rule I and the January 6, 10 and 14, 1983 orders of the Bankruptcy Court constitute unlawful exercises of jurisdiction in contravention of this Court's mandate in Marathon. Moreover, upon information and belief, rules identical in substance to Emergency Rule I have been adopted in virtually every judicial district of the United States.

Under these exceptional circumstances, only this Court's issuance of the extraordinary writs of prohibition and mandamus can prevent the District Court and the Bankruptcy Court, and indeed, all federal courts nationwide, from the continued unlawful exercise of jurisdiction over bankruptcy matters.

ARGUMENT

I.

THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE ISSUANCE OF WRITS OF PROHIBITION AND MANDAMUS IN AID OF THIS COURT'S APPELLATE JURISDICTION

A. The Reform Act Substantially Expanded the Jurisdiction of the Bankruptcy Courts

The Reform Act fundamentally enlarged the jurisdiction of bankruptcy courts.[3] Section 401 of the Reform Act

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3. Under the Bankruptcy Act, 11 U.S.C. §§ 1 et seq. (1976) (repealed 1979) (the "Act") in effect prior to October 1, 1979, there were "courts of bankruptcy," consisting of the federal district courts and referees appointed by them for six-year terms with salaries subject to diminution. These courts of bankruptcy were given original and exclusive jurisdiction over entire bankruptcy cases and special bankruptcy matters such as rulings on petitions, allowances of claims, discharges and plan confirmations pursuant to §§ 1(1), 1(26), 2a, 34, 38 and 40 of the Act. 1 Collier on Bankruptcy ¶ 2.06 (14th ed.
(footnote continued)

repealed the Act with respect to cases commenced on or after October 1, 1979 and abolished the old bankruptcy court system.

(footnote continued from previous page) 1974). This jurisdiction was recognized by Sections 23(19) and Section 256(6), of the Judicial Code of 1911, 36 Stat. 1087, later codified as 28 U.S.C. § 1334.

Under Section 23 of the Act the courts of bankruptcy also had jurisdiction over "controversies" arising in bankruptcy cases concerning property in the custody or control of a debtor or of one not holding under an adverse claim of right, or of one holding under an adverse claim that was "merely colorable." The jurisdiction of courts of bankruptcy over a bankruptcy case, matters peculiar to bankruptcy and controversies concerning property in the actual or constructive control of the debtor was denominated summary jurisdiction. Summary jurisdiction could also be conferred on courts of bankruptcy by consent of the parties.

If a controversy was not within the summary jurisdiction of a court of bankruptcy, the jurisdiction of a court of bankruptcy was concurrent with that of other courts which would have had jurisdiction in the absence of bankruptcy. In addition, §§ 60b, 67e and 70(3) of the Act provided that the courts of (footnote continued)

Section 241(a) of the Reform Act granted to the district court "original and exclusive jurisdiction over all cases under Title 11," 28 U.S.C. § 1471(a), and also granted to the district courts "original but not exclusive jurisdiction of all civil proceedings arising under Title 11 or arising in or related to cases under Title 11." 28 U.S.C. § 1471(b).

(footnote continued from previous page) bankruptcy and "any State court which would have had jurisdiction if bankruptcy had not intervened" had concurrent jurisdiction of the specified controversies enumerated in those sections. This second type of jurisdiction over controversies was denominated plenary jurisdiction.

Under the Act, this bifurcated jurisdiction over controversies, i.e., the dichotomy of summary/plenary jurisdiction, engendered voluminous, costly litigation and delay respecting choice of forum. This litigation gave rise to considerable criticism and was a principal reason cited by proponents of the unified bankruptcy court jurisdiction enacted in Section 241(a) of the Reform Act.

Despite this apparent grant of jurisdiction to the district courts, Congress intended that the newly constituted bankruptcy courts "exercise all of the jurisdiction conferred by this section on the district courts." 28 U.S.C. § 1471(c). As recognized by this Court, "the 'adjunct' bankruptcy courts created by the [Reform] Act exercise jurisdiction behind the facade of a grant to the district courts," Marathon, 102 S. Ct. at 2879, because "[t]he ultimate repository of the [Reform] Act's broad jurisdictional grant is the bankruptcy courts." Id. at 2862 n.3.

The essence of the jurisdictional scheme created by the Reform Act was the elimination of the summary/plenary bifurcation that had existed under the Act and the avoidance of the confusion and delay engendered by such bifurcation.

Id. at 2880 n.40. By virtue of 28 U.S.C. § 1471(c), a new, independent and specialized bankruptcy court would determine all bankruptcy matters. As summarized by this Court:

> [The Reform] Act made at least three significant changes from the bankruptcy practice that immediately preceded it. First, of course, the jurisdiction of the bankruptcy courts was "substantially expanded by the [Reform] Act." H.R.Rep.No. 95-595, supra, p. 13 (1977). Before the [Reform] Act the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court. . . . It cannot be doubted that the new bankruptcy judges, unlike the referees, have jurisdiction far beyond that which can be even arguably characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization. Second, the bankruptcy judges have broader powers than those exercised by the referees. . . . Finally, and perhaps most significantly, the relationship between the district court and the bankruptcy court was changed under the [Reform] Act. Before the [Reform] Act,

> bankruptcy referees were "subordinate adjuncts of the district courts." In contrast, the new bankruptcy courts are "independent of the United States district courts."

Id. at 2876 n.31 (citations omitted).

B. Marathon Held Unconstitutional the Entire Jurisdictional Grant of the Reform Act

This Court in Marathon held that the Reform Act violated Article III of the United States Constitution by removing most, if not all, of the essential attributes of judicial power from the Article III district court and vesting those attributes in a non-Article III adjunct. Id. at 2880.[4]

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4. Under the Reform Act, bankruptcy judges "do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued 'good behavior.' Rather, they are appointed for 14-year terms, and can be removed by the judicial council of the circuit in which they serve on

(footnote continued)

In discussing whether to apply its decision in Marathon retroactively, the plurality noted that:

> As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constiutional challenge on a claim-by-claim basis.

(footnote continued from previous page) grounds of 'incompetence, misconduct, neglect of duty or physical or mental disability.' . . . [T]he salaries of bankruptcy judges are not immune from diminution by Congress." Id. at 2866.

Id. at 2880 n.40 (emphasis supplied).[5]

The concurring opinion stated that:

> Because I agree with the plurality that this grant of au-

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5. Where Congress intends that a statutory scheme take effect as a whole, the unconstitutionality of an essential part renders the whole invalid. Zobel v. Williams, 102 S. Ct. 2309, 2315 (1982); Buckley v. Valeo, 424 U.S. 1, 108 (1976); United States v. Jackson, 390 U.S. 570, 585 (1968); Champlin Roofing Co. v. Corporation Commission of State of Oklahoma, 286 U.S. 216, 234 (1932).

In this regard, the report accompanying the House version of the Reform Act shows that the House specifically considered and rejected the possibility of assigning bankruptcy matters to the district court due to the district court's workload, unfamiliarity with bankruptcy matters and the statutory priority of criminal cases on the district court's docket. H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 14-15, reprinted in 1978, U.S. Code Cong. & Ad. News 5963, 5976.

Moreover, during the debates in the House, an amendment was offered by Congressmen Danielson and Railsback which would have eliminated the separateness and broad independent jurisdiction of the bankruptcy courts while retaining the remaining provisions of the bill. 123 Cong. Rec. H11,767-68 (daily ed. Oct. 28, 1977). This amendment was ultimately overwhelmingly rejected. 124

(footnote continued)

thority is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see ante, at 2880 n.40, I concur in the judgment.

(footnote continued from previous page) Cong. Rec. H.474-78 (daily ed. Feb. 1, 1978). Congressman McClory, a member of the House Subcommittee reporting out the bill, perhaps best summarized Congressional reaction when he said:

> [W]e are empowering them to handle the kind of work we want them to handle. It cannot be done with the old machinery. We cannot handle the new business in an old way. 123 Cong. Rec. H 11,774 (daily ed. Oct. 28, 1977).

The Danielson/Railsback amendment was vigorously opposed by other proponents of the bill as well. Congressman Rodino, chairman of the House Judiciary Committee responsible for reporting out the bill, stated that "the most significant portion of the bill concerns the way bankruptcy cases are handled." Id. at H11,699. Congressman Butler, the ranking minority member of the Subcommittee, stated that, "[t]his bill serves no purpose whatsoever if the independence of the bankruptcy courts is removed." Id. at H11,703.

Id. at 2882 (Rehnquist, J., concurring).

Therefore, a majority of this Court determined that all of Section 241(a) of the Reform Act was unconstitutional because the impermissible grant of jurisdiction to the bankruptcy judges contained in 28 U.S.C. § 1471(c) was not severable from the remaining grant of authority under Section 241(a). Accordingly, Marathon invalidated the entirety of the Reform Act's grant of bankruptcy jurisdiction to both the district courts and the bankruptcy courts.

Once a majority of this Court determined that the Reform Act's entire jurisdictional grant was unconstitutional, the judicial process ended, as required by the separation of powers that is the foundation of our constitutional system. See Tennessee Valley Authority v. Hill, 437 U.S. 153, 194-195 (1978).

Therefore, it is now Congress' exclusive responsibility to remedy the constitutional defect of the Reform Act by enacting such remedial legislation as it deems appropriate. As the plurality noted:

> We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy [Reform] Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

Marathon, 102 S. Ct. at 2880 n.40.

C. Marathon Invalidated the Automatic Stay

The Automatic Stay is one of the "fundamental debtor protections provided by the bankruptcy laws." H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6296; S. Rep. No. 95-989, 95th Cong., 2d

Sess. 54, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5840. Its enforcement by a court of competent jurisdiction is critical to the unified bankruptcy system created by Congress in the Reform Act. By reason of this Court's decision in Marathon, no court has the power to enforce the Automatic Stay. Because the objectives of the Automatic Stay cannot be achieved without an enforcement mechanism, it follows that the Automatic Stay is also invalid. See footnote 5, supra. No court can conclude that if Congress were aware of the unconstitutionality of bankruptcy jurisdiction created by the Reform Act, it would simply leave the Automatic Stay intact. Cf. Marathon, 102 S. Ct. at 2880 n.40.

D. Emergency Rule I is Unconstitutional

Emergency Rule I adopted by the the District Court, from which the Bankruptcy Court derives its purported authority, and which purportedly enables the Bankruptcy Court to enforce the provisions of the Automatic Stay and the Restraining Order, is itself unconstitutional.[6] It is predicated on the proposition that Marathon did not invalidate 28 U.S.C. §§ 1471(a) and (b). As stated in the memorandum of the Administrative Office of the United States Courts dated September 27, 1982 which recommended adoption of the emergency rule:

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6. Emergency Rule I, by dividing bankruptcy jurisdiction between the District Court and the Bankruptcy Court, effectively reinstates the dichotomy of summary/plenary jurisdiction that existed under the Act. As the plurality noted in Marathon, this Court never approved or disapproved of the scheme under the Act. 102 S. Ct. at 2876 n.31.

> Marathon does not cause a jurisdictional lapse. The Administrative Office concludes that Marathon did not invalidate 11 [sic] U.S.C. Sections 1471(a), (b). In addition, Sections 404 and 405 of the 1978 Act also vest bankruptcy powers in the district courts as "courts of bankruptcy" until 1984.

A copy of the September 27, 1982 memorandum appears in the Appendix at A-113.

As demonstrated in the preceding sections, Marathon invalidated all of the jurisdictional provisions of 28 U.S.C. § 1471, and not just a portion thereof.

Arguments may be made that other statutory grants preserve bankruptcy jurisdiction in the district courts. Possible sources of such district court jurisdiction include 28 U.S.C. § 1331, 28 U.S.C. § 1334, and Sections 404 and 405 of the Reform Act.

Examination shows that these sources do not confer bankruptcy jurisdiction on the district courts.

1. The District Courts Do Not Have Bankruptcy Jurisdiction Under 28 U.S.C. § 1331

Section 1331 of 28 U.S.C. grants the district courts jurisdiction over all civil actions "arising under . . . laws of the United States." This "federal question" jurisdiction has existed since 1875. See 94 Stat. 2369; 72 Stat. 415; 18 Stat. 470.

Congress did not intend that federal question jurisdiction under 28 U.S.C. § 1331 include a grant to the district courts of bankruptcy jurisdiction; every bankruptcy law that Congress had enacted has included an express jurisdictional grant over bankruptcy matters. See, e.g., 5 Stat. 446; 14 Stat. 517; 30

Stat. 545; 92 Stat. 2668. If Congress had intended that federal question jurisdiction under 28 U.S.C. § 1331 encompass bankruptcy jurisdiction, the express grants of bankruptcy jurisdiction in every bankruptcy law it enacted would have been surplusage.

Even assuming, arguendo, that federal question jurisdiction may embrace some bankruptcy matters, it surely is not co-extensive with the broad jurisdictional grant of Section 241(a) of the Reform Act. The jurisdictional grant under 28 U.S.C. § 1471 (b), for example, includes jurisdiction over civil proceedings "arising in or related to cases under Title 11." Proceedings related to cases under Title 11 do not constitute cases "arising under the laws of the United States"; a case arises under the law that creates the cause of

action. American Well Works Co. v. Lane & Bowler Co., 241 U.S. 257 (1916). Proceedings related to cases under Title 11 typically involve actions which arise under state, not federal law. Chamberlain Livestock Auction, Inc. v. Aberdeen Production Credit Association, 9 Bankr. Ct. Dec. 783 (CRR) (Bankr. D.S.D. 1982).

Moreover, although this Court has held that the jurisdictional grant to district courts in Section 2a of the Act conferred pendent jurisdiction, regardless of diversity of citizenship or the presence of federal questions, over a trustee's action against a corporate debtor's officers for misappropriation of corporate assets, Williams v. Austrian, 331 U.S. 642 (1947), the Court has also held that federal question jurisdiction supports pendent jurisdiction over non-federal claims only if a fed-

eral claim with "substance sufficient to confer subject matter jurisdiction on the court existed." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Accordingly, it would appear that there can be no pendent jurisdiction over bankruptcy matters where there is no underlying federal claim.

2. The District Courts Do Not Have Bankruptcy Jurisdiction Under 28 U.S.C. § 1334

28 U.S.C. § 1334 provides no basis for the assertion of bankruptcy jurisdiction by the district courts. Section 238 of the Reform Act has repealed and replaced 28 U.S.C. § 1334 with an entirely new provision entitled "Bankruptcy Appeals." While Section 402(b) of the Reform Act states that Section 238 does not take effect until April 1, 1984,

Section 405(c)(2) provides that until April 1, 1984:

> The jurisdiction of the district court, courts of appeal, and panels of bankruptcy judges to hear appeals shall be the same as the jurisdiction of such courts and panels granted under the amendments made by Sections . . . 238 . . . of this Act to hear appeals from the judgments, orders, and decrees of the bankruptcy courts established under Section 201 of this Act. (emphasis supplied)

Thus, as a practical matter, the provisions of the Reform Act effectively render "new" 28 U.S.C. § 1334 operative as of October 1, 1979. Congress plainly intended to repeal the provisions of "old" 28 U.S.C. § 1334 effective on October 1, 1979.

Even if "old" 28 U.S.C. § 1334 enjoys some lingering vitality, its express terms confer only limited jurisdiction on the district courts. The provision granted the district courts

original jurisdiction, exclusive of the courts of the states, of "all matters and proceedings in bankruptcy" 28 U.S.C. § 1334. Thus, old 28 U.S.C. § 1334 contains a far narrower jurisdictional grant than that of Section 241(a) of the Reform Act which embraces "all cases under Title 11" and "all civil proceedings arising under Title 11 or arising in or related to cases under Title 11."

3. The District Courts Do Not Have Bankruptcy Jurisdiction Under Sections 404 and 405 of the Reform Act

Sections 404 and 405 of the Reform Act also prove ineffective to sustain continued bankruptcy jurisdiction in the district courts. The reliance by Emergency Rule I on Sections 404 and 405 reflects the view expressed by the Gen-

eral Counsel of the Administrative Office of the United States Courts in a July 22, 1982 memorandum, reprinted in H.R. Rep. No. 97-807, 97th Cong., 2d Sess. 30 (1982). Sections 404 and 405 of the Reform Act do not incorporate and preserve the jurisdiction conferred on courts of bankruptcy by Section 2a of the Act. Id. at 32-49. Sections 404 and 405 of the Reform Act simply direct that the old courts of bankruptcy as defined in Section 1(1) of the Act and created by Section 2a of the Act shall exercise the powers conferred by 28 U.S.C. § 1471, until April 1, 1984. Emergency Rule I ignores Section 401(a) of the Reform Act which repealed the Act in its entirety, including the jurisdictional grant in Section 2a, effective October 1, 1979.

Additionally, Sections 404 and 405 represent the very grant of jurisdictional authority to bankruptcy courts found constitutionally defective in Marathon. Section 404, like 28 U.S.C. § 1471(a), provides bankruptcy jurisdiction to the district courts as "courts of bankruptcy." Section 405 provides that all cases commenced under Title 11 during the transition period (October 1, 1979 to March 31, 1984) shall be referred to the United States bankruptcy judges and that ". . . all proceedings in such cases shall be before the United States bankruptcy judges." Sections 404 and 405 are insufficient to sustain an independent and constitutionally valid grant of power over bankruptcy cases to the district courts.[7]

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7. In Maiorino v. Branford Savings Bank, 7 Collier Bankr. Cas. 2d 524 (2d
(footnote continued)

E. The Exceptional Circumstances of this Case

Petitioners have suffered and will continue to suffer extreme prejudice in the Asbestos Cases by reason of (a) the Bankruptcy Court's continued application of the Automatic Stay and Restraining Order to Manville and its continued enforcement of the provisions thereof, and (b) the continued unlawful exercise of bankruptcy jurisdiction by both the Bankruptcy Court and the District Court.

This Court's stay of its judgment in Marathon enabled Manville to enjoy the benefits and protections of the

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(footnote continued from previous page) Cir. 1982), the United States Court of Appeals for the Second Circuit held that Section 405(c)(1) of the Reform Act did not serve as an independent jurisdictional grant. The Second Circuit stated that treating 405(c)(1) as an independent jurisdictional grant "would lead to strange and surely unintended results" in the context of appellate jurisdiction over bankruptcy matters. Id. at 529.

Automatic Stay and Restraining Order. Petitioners, and other defendants in the Asbestos Cases, have been forced to shoulder the entire burden of this massive litigation in the absence of the principal defendant.

Upon entry of the judgment in Marathon, the Automatic Stay was invalidated and petitioners submit that they are not barred from moving to restore Manville as a party to the Asbestos Cases. The Bankruptcy Court, under the purported authority of Emergency Rule I, has unlawfully enjoined the motion of Keene Corporation and Pacor, Inc. in the Philadelphia Asbestos Case and any such motion in the other Asbestos Cases. Thus, petitioners confront a Hobson's choice: they can continue to be prejudiced by the prosecution of the Asbestos Cases without Manville, or risk contempt at

the hands of the Bankruptcy Court or the District Court if they attempt to restore Manville as a party.

Beyond the 12,000 Asbestos Cases, hundreds of thousands of bankruptcy cases are pending in the bankruptcy courts nationwide. There are over 700,000 bankruptcy estates and some 100,000 adversary proceedings in bankruptcy now pending. New bankruptcy petitions are filed at the rate of 10,000 per week. Administrative Office of United States Courts, 1982 Annual Report of the Director, pp. 8, 10 (preliminary ed. September 22, 1982).

Every bankruptcy court in this country is now operating without any legitimate authority whatsoever. Rules identical in substance to Emergency Rule I have been adopted in virtually every judicial district. The district courts'

attempt to determine the method of bankruptcy adjudication by judicial fiat is a usurpation of the legislative function and a violation of the principle of separation of powers respected by this Court in Marathon. 102 S. Ct. at 2880. Every order of a bankruptcy court or a district court now entered in a bankruptcy case is unconstitutional, and jeopardizes the rights of debtors and creditors alike.[8] Hundreds of thousands

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8. The continued exercise of bankruptcy jurisdiction by the bankruptcy courts and district courts poses an additional, serious concern. The Honorable Charles A. Anderson, United States Bankruptcy Judge for the United States Bankruptcy Court, Southern District of Ohio, Western Division, in a decision dated December 27, 1982, states that this Court's decision in Marathon raises the specter of potential civil liability for bankruptcy judges and district judges who exercise jurisdiction where no colorable basis for exercising that jurisdiction exists. In re Schear Realty & Investment Co. (Winters National Bank & Trust v. Schear Group, Adv. 3-82-0491), Case No. 3-82-01843 (Bankr. S.D. Ohio Dec. 27, 1982). A copy of

(footnote continued)

of jobs and companies and literally billions of dollars are at risk.

This Court has consistently stated that it will issue the extraordinary writs of prohibition and mandamus in exceptional cases in aid of its appellate jurisdiction. United States v. United States District Court for the Southern District of New York, 334 U.S. 258, 263 (1948) (the power of mandamus "protects the appellate jurisdiction which might be otherwise defeated and extends to support an ultimate power of review, though it may not be immediately and directly involved"); see also Ex parte Republic of Peru, 318 U.S. 578, 584 (1943); Ex parte United States, 287 U.S. 241, 246 (1932); McLellan v. Carland, 217 U.S. 268 (1910); Ex parte

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(footnote continued from previous page) Judge Anderson's decision appears in the Appendix at A-119.

Crane, 30 U.S. (5 Pet.) 190 (1831); Marbury v. Madison, 1 Cranch 137, 175 (1803).

In Ex parte United States, 287 U.S. 241, 248-49 (1932), this Court stated that it has:

> . . . full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which appellate jurisdiction in vested in the Circuit Court of Appeals . . . but . . . such power will be exercised only where a question of public importance is involved or where the question is of such a nature that it is particularly appropriate that such action by this court should be taken.

Among the questions that this Court has recognized as particularly appropriate for the issuance of extraordinary writs is that of an inferior court's assertion of jurisdiction where no such jurisdiction exists. Will v. United States, 389 U.S. 90, 106-07 (1967);

Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383 (1953); DeBeers Consolidated Mines v. United States, 325 U.S. 212, 217 (1945); United States v. California Alkali Export Association, 325 U.S. 196, 204 (1945); Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943). In the face of this Court's decision in Marathon, the continued exercise of bankruptcy jurisdiction by the bankruptcy courts and district courts nationwide constitutes an invalid assertion of jurisdiction and a flagrant abuse of judicial power. This Court must act to halt this subversion of its appellate jurisdiction.

II.

ADEQUATE RELIEF IS UNAVAILABLE IN ANY OTHER FORM OR FROM ANY OTHER COURT

Writs of mandamus and prohibition, albeit rare, are appropriately issued where, as here, inferior courts disregard the mandates of this Court and matters of public importance are involved. See Ex parte United States, 287 U.S. 241, 248-49 (1932). The extraordinary writs afford an "expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction or compelling it to exercise its authority when it is its duty to do so." Ex parte Republic of Peru, 318 U.S. 578, 583 (1943).

In the Manville reorganization, the Bankruptcy Court and the District Court have made it abundantly clear that they

will not comply with Marathon, but rather will abide by Emergency Rule I. Virtually all other district courts have followed suit by enacting similar rules. Nonethless, some courts have refused to follow a course clearly unconstitutional, choosing instead, to obey this Court's decision in Marathon.[9]

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9. In re Schear Realty & Investment Co. (Winters National Bank & Trust v. Schear Group Adv. 3-82-0491) Case No. 3-82-01843 (Bankr. S.D. Ohio Dec. 27, 1982). In Schear, the Honorable Charles A. Anderson, United States Bankruptcy Judge, United States District Court for the Southern District of Ohio labelled the Emergency Rule "a jurisdictional fiction . . . purporting to legislate delegated jurisdiction to the Bankruptcy Courts from the District Courts [which could] rise no higher in effect than the Congressional legislation found unconstitutional." Appendix at A-140. Judge Anderson, in connection with the state law claim at issue in the case, also concluded that the district court had no more jurisdiction over a State law claim than did the bankruptcy court; stating that "[w]e are constrained to conclude that the only existing forums are the state courts." Appendix at A-137. See also Smith v. Johns Manville Sales Corp., Nos. 80-4680, 80-11156 (Fla. Cir.

(footnote continued)

The passage of time can only exacerbate what is now a constitutional crisis. Given these circumstances, the traditional avenues of appellate review prove inadequate.[10] This Court alone can compel the judiciary to respect the fundamental constitutional principle of the separation of powers and thereby afford Congress the opportunity to reconstitute the bankruptcy courts.

(footnote continued from previous page) Ct. Dade Co. Jan. 17, 1983), appearing at A-160. But see In re Northland Point Partners (Prudential Insurance Co. of America v. Stouffer Corp., Adv. No. 82-2277-W) Case No. 82-05387-W) (E.D. Mich. Jan. 7, 1983) appearing at A-153, upholding the emergency rule.

10. A decision of United States Court of Appeals for the Second Circuit will not aid petitioners. The Asbestos Cases are pending in state and federal courts throughout the United States. The questions presented by this petition affect over 700,000 pending bankruptcy cases. A speedy and final resolution is imperative and can only be provided by this Court.

PRAYER FOR RELIEF

WHEREFORE, petitioner prays:

1. That this Court issue writs of prohibition and mandamus to The Honorable Constance Baker Motley, Chief Judge, United States District Court for the Southern District of New York, and The Honorable Burton R. Lifland, United States Bankruptcy Judge, United States Bankruptcy Court for the Southern District of New York, directing and commanding them to obey this Court's mandate in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 102 S.Ct. 2858 (1982), and prohibiting them from disregarding said mandate by enforcing Emergency Rule I, the Automatic Stay and the Restraining Order; and

2. That petitioners have such additional relief as may be necessary and appropriate in the premises.

Dated: January 24, 1983

Respectfully submitted,

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